

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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## TROY CAPITAL LLC.

**Plaintiff(s),**

Case No. 2:20-CV-205 JCM (DJA)

## ORDER

v.

PATENAude & FELIX APC, et al..

Defendant(s).

Presently before the court is plaintiff Troy Capital, LLC’s motion for partial summary judgment. (ECF Nos. 13, 15). Defendants Patenaude & Felix APC (“P&F”), Raymond A. Patenaude, Michael D. Kahn, Angie Hong Hoar, Kristopher C. Childers, and Ryan Johnson responded, (ECF No. 50), to which plaintiff replied, (ECF No. 51).

Also before the court is plaintiff Troy Capital, LLC, and third-party defendants, Rance Willey and Troy Dupuis's, motions for summary judgment, or in the alternative, for dismissal, of counterclaims. (ECF No. 32). Defendant/third-party plaintiff Patenaude & Felix APC responded. (ECF No. 42).

Also before the court is plaintiff and third-party defendants' motion for summary judgment, or in the alternative, for dismissal, of defendants' amended counterclaims and third-party complaint. (ECF No. 49). Defendant/third-party plaintiff responded, (ECF No. 53), to which plaintiff and third-party defendants replied, (ECF No. 54).

## I. Background

The instant action arises from debt collection services performed by defendants for the plaintiff in California and Arizona. (ECF No. 1). Plaintiff Troy Capital is a resident of Nevada. (*Id.*). Defendant P&F is a California professional corporation with offices in Arizona,

1 California, and Nevada—along with other states. (*Id.*). Defendants Raymond Patenaude,  
 2 Michael D. Kahn, and Angie Hong Hoar are California attorneys. *Id.* Defendants Kristopher C.  
 3 Childers and Ryan Johnson are Arizona attorneys. (*Id.*).

4 Plaintiff retained P&F for the purposes of debt collection on judgments in California and  
 5 Arizona; the parties entered into an attorney agreement (the “agreement”) on July 14, 2016.  
 6 (*Id.*). Substantively, the agreement provided that P&F would take all necessary steps to keep the  
 7 pre-judgment debts and obligations from expiring, to file suit and secure judgment on all viable  
 8 pre-judgment debts, and to collect on and renew all judgments. (*Id.*).

9 Dissatisfied with P&F’s work, plaintiff decided to transfer this work to new law firms—  
 10 Lippman Recupero in Tucson, Arizona, and Goldsmith & Huyll in Northridge, California  
 11 (collectively “new counsel”). (*Id.*). Plaintiff corresponded with P&F on December 7, 2018,  
 12 asking that it wind-up its work in Arizona and California and transfer its files to plaintiff’s new  
 13 counsel. (*Id.*). Upon receiving the files, new counsel allegedly informed plaintiff that  
 14 “hundreds of pre-litigation collection accounts had become time barred while with  
 15 [d]efendant . . . for its failure to file suit within the statute of limitation, and that hundreds of  
 16 judgments had become time barred while with [d]efendant . . . for its failure to renew those  
 17 judgments.” (*Id.*).

18 On December 19, 2020, plaintiff filed its underlying complaint in state court alleging,  
 19 *inter alia*, breach of contract and legal malpractice. (*Id.*). Defendants removed to this court on  
 20 January 30, 2020, (*id.*), and on February 13, 2020, defendants unsuccessfully moved to dismiss  
 21 this action for lack of personal jurisdiction and *forum non conveniens*, (ECF Nos. 6, 23).

22 On July 31, 2020, defendants amended their answer to the complaint and counterclaims  
 23 against plaintiff and third-party defendants Rance Wiley and Troy Dupius—officers of Troy  
 24 Capital, LLC—alleging 1) fraud in the inducement, 2) concealment, and 3) fraudulent  
 25 misrepresentation. (ECF No. 41).

26 Plaintiff moved for partial summary judgment on its first and third causes of action “for  
 27 breach of contract, and/or breach of fiduciary duty.” (ECF No. 13). This motion pertains only to  
 28 201 of the 1,808 collection files that plaintiff gave to defendants for collection services. (*Id.*).

1        This court granted plaintiff's motion for partial summary judgment on the merits, (ECF  
 2 No. 33), but reconsidered upon defendants' explanation for why they failed to brief any  
 3 opposition. (ECF No. 48). With the motion now fully briefed, this court reexamines those issues  
 4 alongside the parties' other pending motions. (ECF Nos. 32, 39, 49).

5        **II. Legal Standard**

6              *A. Summary Judgment*

7        The Federal Rules of Civil Procedure allow summary judgment when the pleadings,  
 8 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if  
 9 any, show that "there is no genuine dispute as to any material fact and the movant is entitled to a  
 10 judgment as a matter of law." Fed. R. Civ. P. 56(a). A principal purpose of summary judgment  
 11 is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S.  
 12 317, 323–24 (1986).

13        For purposes of summary judgment, disputed factual issues should be construed in favor  
 14 of the nonmoving party. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to  
 15 withstand summary judgment, the nonmoving party must "set forth specific facts showing that  
 16 there is a genuine issue for trial." *Id.*

17        In determining summary judgment, a court applies a burden-shifting analysis. "When the  
 18 party moving for summary judgment would bear the burden of proof at trial, it must come  
 19 forward with evidence which would entitle it to a directed verdict if the evidence went  
 20 uncontested at trial. In such a case, the moving party has the initial burden of establishing the  
 21 absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage  
 22 Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

23        By contrast, when the nonmoving party bears the burden of proving the claim or defense,  
 24 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an  
 25 essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving  
 26 party failed to make a showing sufficient to establish an element essential to that party's case on  
 27 which that party will bear the burden of proof at trial. See *Celotex Corp.*, 477 U.S. at 323–24. If  
 28 the moving party fails to meet its initial burden, summary judgment must be denied and the court

1 need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S.  
 2 144, 159–60 (1970).

3 If the moving party satisfies its initial burden, the burden then shifts to the opposing party  
 4 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*  
 5 *Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a dispute of  
 6 material fact conclusively in its favor. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*,  
 7 809 F.2d 626, 631 (9th Cir. 1987). It is sufficient that “the claimed factual dispute be shown to  
 8 require a jury or judge to resolve the parties’ differing versions of the truth at trial.” *Id.*

9 In other words, the nonmoving party cannot avoid summary judgment by relying solely  
 10 on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d  
 11 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and  
 12 allegations of the pleadings and set forth specific facts by producing competent evidence that  
 13 shows a genuine issue for trial. *See Celotex*, 477 U.S. at 324.

14 At summary judgment, a court’s function is not to weigh the evidence and determine the  
 15 truth, but to determine whether a genuine dispute exists for trial. *See Anderson v. Liberty Lobby*,  
 16 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all  
 17 justifiable inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the  
 18 nonmoving party is merely colorable or is not significantly probative, summary judgment may be  
 19 granted. *See id.* at 249–50.

20       **B. Motion to Dismiss**

21 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief  
 22 can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short  
 23 and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.  
 24 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not  
 25 require detailed factual allegations, it demands “more than labels and conclusions” or a  
 26 “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
 27 (2009) (citation omitted).

28

1           “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550  
 2 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual  
 3 matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation  
 4 omitted).

5           In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply  
 6 when considering motions to dismiss. First, the court must accept as true all well-pled factual  
 7 allegations in the complaint; however, legal conclusions are not entitled to the assumption of  
 8 truth. *Id.* at 678-79. Mere recitals of the elements of a cause of action, supported only by  
 9 conclusory statements, do not suffice. *Id.*

10          Second, the court must consider whether the factual allegations in the complaint allege a  
 11 plausible claim for relief. *Id.* at 679. A claim is facially plausible when plaintiff’s complaint  
 12 alleges facts that allow the court to draw a reasonable inference that defendant is liable for the  
 13 alleged misconduct. *Id.* at 678.

14          Where the complaint does not permit the court to infer more than the mere possibility of  
 15 misconduct, the complaint has “alleged—but it has not shown—that the pleader is entitled to  
 16 relief.” *Id.* at 679. When the allegations in a complaint have not crossed the line from  
 17 conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

18          The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d  
 19 1202, 1216 (9th Cir. 2011). The *Starr* court held that:

20          First, to be entitled to the presumption of truth, allegations in a  
 21 complaint or counterclaim may not simply recite the elements of a  
 22 cause of action, but must contain sufficient allegations of  
 23 underlying facts to give fair notice and to enable the opposing  
 24 party to defend itself effectively. Second, the factual allegations  
 25 that are taken as true must plausibly suggest an entitlement to  
 26 relief, such that it is not unfair to require the opposing party to be  
 27 subjected to the expense of discovery and continued litigation.

28          *Id.*

### 29          **III. Discussion**

30          As an initial matter, plaintiff’s first motion to dismiss or for summary judgment on  
 31 defendants’ counterclaims is denied as moot, (ECF No. 32), because defendants filed an

1 amended answer, counterclaim, and third-party complaint, which now governs this matter. (ECF  
 2 No. 41). Accordingly, plaintiff and third-party defendants have filed a renewed motion to  
 3 dismiss or for summary judgment on the claims and allegations contained within defendants'  
 4 amended filings. (ECF No. 49).

5 This court first examines plaintiff's motion for partial summary judgment. (ECF No. 13).

6 *A. Plaintiff's Motion for Partial Summary Judgment*

7 With the instant motion for partial summary judgment fully briefed, this court denies the  
 8 motion upon consideration of defendants' request for additional discovery pursuant to Federal  
 9 Rule of Civil Procedure 56(d).<sup>1</sup> (ECF Nos. 13, 50, 51).

10 Rule 56(d) states that “[i]f a nonmovant shows by affidavit or declaration that, for  
 11 specified reasons, it cannot present facts essential to justify its opposition, the court may . . .  
 12 defer considering the motion or deny it.” Fed. R. Civ. Pro. 56(d). Where “a summary judgment  
 13 motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue  
 14 discovery relating to its theory of the case, district courts should grant any [Rule 56(d)] motion  
 15 fairly freely.” *Burlington N. Santa Fe R.R. v. Assiniboine & Sioux Tribes of the Fort Peck*  
 16 *Reservation*, 323 F.3d 767, 773-74 (9th Cir. 2003). This court finds such a situation here. (ECF  
 17 No. 50). The instant motion for partial summary judgment was filed less than a year after this  
 18 case was filed and before meaningful discovery. (ECF Nos. 1, 13). At this juncture, defendants  
 19 have properly invoked Rule 56(d) and explained why it is necessary. (ECF No. 50).

20 This court exercises its discretion to find that the issues presented in plaintiff's motion  
 21 and defendants' opposition would benefit from additional discovery. Plaintiff's motion for  
 22 partial summary judgment is denied. (ECF No. 13).

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26           <sup>1</sup> In making this request, defendants cite to Federal Rule of Civil Procedure 56(f). The  
 27 substance of that rule was amended into Rule 56(d) in 2010. This court construes the request  
 28 pursuant to the appropriate rule in light of defendants' clear invocation of the rule and citation of  
*Burlington Northern Santa Fe R. Co. v. Assiniboine and Sioux Tribes of Fort Peck Reservation*,  
 323 F.3d 767 (9th Cir. 2003).

1                   ***B. Plaintiff and Third-Party Defendants' Motion for Summary Judgment on Defendants'***  
 2                   *Counterclaims*

3                   Plaintiff and third-party defendants seek summary judgment, or in the alternative,  
 4                   dismissal of defendants' counterclaims: 1) fraud in the inducement, 2) concealment, and 3)  
 5                   fraudulent misrepresentation. (ECF No. 49).

6                   In response to the instant arguments for summary judgment, defendants again seek to  
 7                   invoke Rule 56(d) here, citing the same issues as their response to the above motion for partial  
 8                   summary judgment. (ECF No. 53). As reasoned above, this court finds that additional discovery  
 9                   appropriate here as well. (*Id.*). Summary judgment on the counterclaims is denied.

10                  However, this court will examine the merits of plaintiff's request to dismiss the  
 11                  counterclaims pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 49). Plaintiff and  
 12                  third-party defendants argue that the counterclaims are pled with insufficient particularity. (*Id.*).  
 13                  Federal Rule of Civil Procedure 9(b) requires a party to "state with particularity the  
 14                  circumstances constituting fraud or mistake." Fed. R. Civ. Pro. 9(b). This "particularity"  
 15                  requirement demands the precise pleading of "the who, what, when, where, and how of the  
 16                  misconduct charged," as well as what is false or misleading about the purportedly fraudulent  
 17                  statement, and why it is false. *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th  
 18                  Cir. 2010); *see Stickler v. AnswerConnect Teleservices, Inc.*, No. 3:15-CV-00271-LRH, 2015  
 19                  WL 3935242 (D. Nev. June 26, 2015).

20                  Defendants' first and third counterclaims—for fraud in the inducement and fraudulent  
 21                  misrepresentation—are dismissed for failure to adhere to this heightened standard. (ECF No.  
 22                  49). This court cannot construe the timing, location, context, individuals involved, or content of  
 23                  defendants' allegation from the pleadings. Throughout the third-party complaint, defendants  
 24                  allege that "Willey and Dupuis" made certain representations or acted fraudulently. (ECF No.  
 25                  41). Indeed, the third-party complaint fails to provide enough information on exactly who said  
 26                  what in the alleged situations. "Claims that fail to identify which defendant is responsible for  
 27                  what alleged injury do not adequately place defendants on notice of the claim or claims being  
 28                  asserted against them." *Goodwin v. Executive Trustee Services, LLC*, 680 F. Supp. 2d 1244 (D.

1 Nev. 2010). Furthermore, the specific fraudulent statements and misrepresentations are never  
 2 identified—neither in content, place, nor time. (ECF No. 41). Although defendants do not  
 3 merely recite the elements here, this court is unable to parse out the “numerous false  
 4 representations” from the pleadings in a meaningful way, nor can the parties appropriately  
 5 respond. (*Id.*). Thus, defendants’ first and third counterclaims are dismissed.

6 On the other hand, defendants’ second counterclaim for concealment is sufficiently pled  
 7 and may proceed. (ECF Nos. 41, 53). The third-party complaint specifically states 1) what  
 8 information was allegedly withheld and 2) how plaintiffs and counter-defendants allegedly had a  
 9 duty to disclose that information. (ECF No. 41). There is sufficient information here for this  
 10 court to examine, and for the parties to respond to, defendants’ claim of concealment.

11 In summary, defendants’ second counterclaim may proceed, while their first and second  
 12 counterclaims are dismissed. (ECF No. 49). However, this court grants defendants’ unopposed  
 13 request for leave to amend their counterclaims and third-party complaint. (ECF No. 53).

14 **IV. Conclusion**

15 Accordingly,

16 **IT IS HEREBY ORDERED, ADJUDGED, and DECREED** that plaintiff’s motion for  
 17 partial summary judgment (ECF No. 13) be, and the same hereby is, DENIED.

18 **IT IS FURTHER ORDERED** that plaintiff and third-party defendants’ motion for  
 19 summary judgment, or in the alternative, for dismissal, of defendants’ counterclaims (ECF No.  
 20 32) be, and the same hereby is, DENIED as moot.

21 **IT IS FURTHER ORDERED** that plaintiff and third-party defendants’ motion for  
 22 summary judgment, or in the alternative, for dismissal, of defendants’ amended counterclaims  
 23 and third-party complaint (ECF No. 49) be, and the same hereby is, GRANTED in part and  
 24 DENIED in part.

25 DATED February 26, 2021.

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UNITED STATES DISTRICT JUDGE  
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